No. 16,231

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIVIDAD SALINAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

SUMMARY OF ARGUMENT.

1. It was proper for the jury to bring a verdict of guilty of the crime of Arson in the Second Degree although the charge was Arson in the First Degree.

(a) The arson law as amended describes a crime specifically consisting of definite superior and inferior degrees.

(b) The Alaskan code relating to criminal procedure specifically provides that where a crime consists of degrees the jury may find the defendant guilty of any degree inferior to the crime charged in the indictment.

2. It was proper for the jury to bring in a verdict of guilty of the crime of Arson in the Second Degree as that charge fell within the definition of a crime necessarily included in that which was charged in the indictment.

3. Conclusion.

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STATEMENT OF FACTS.

The appellant is not correct in his statement of facts at page 2 of his brief where he alleges that the jury was inspired to make an independent finding that the defendant was guilty of arson in the second degree as an included offense. Appellant was previously advised by the court below in deciding his Motion for Judgment of Acquittal notwithstanding the verdict that "The verdict returned on Count I (Arson in First or Second Degree) was specifically in accordance with the instructions of the Court: they did not superimpose their verdict in any sense." (Tr. p. 45.) The instructions of the court provided for a finding of this

type. (See Instruction 3 A Tr. p. 8 and Instruction 17 Tr. p. 18, the five forms of verdict which define Arson in the First and Second Degree.) They were furnished a verdict to turn in if they made a finding of guilty as to Arson in the Second Degree. The finding was thus fully within the instructions of the court.

At several points in the trial appellee introduced evidence that the building was a dwelling house and appellant's attorney sought to rebut this by cross examination claiming, specifically, that the building had been abandoned as far as use as a dwelling house was concerned. (Tr. pp. 62-66) [government's direct examination], Tr. pp. 115-117 [cross examination by defendant], Tr. 200-223 [government's direct examination], Tr. pp. 226-230 [defendant's cross examination]; Tr. pp. 233-234 [government's redirect]. The government produced two witnesses who stated two different people had occupied the rooms over the grill within the past several months and that a family had lived there the preceding summer and that one of the last residents had gone out to a hospital but had left some personal belongings behind. (See above transcript citations.) This point was fully covered by the trial judge out of the presence of the jury during the trial (Tr. pp. 428-430) while ruling on a motion for judgment of acquittal and motion to elect. He stated that where there was conflicting evidence as to the character of the building he should submit the lesser degree to the jury.

At page 2 of his brief appellant states the charge was based on Section 65-5-1 and 6 ACLA 1949 as duly

amended by chapter 141 of the 1957 Session Laws of Alaska. Since the amended law is very pertinent in considering the matters of degrees of the crime and the aspect of an included lesser offense they are herewith set forth in full as they now appear in Volume 3 of the Cumulative Supplement to Alaska Compiled Laws Annotated 1949.

> Sec. 65-5-1. *Arson: First degree: Burning of dwellings.* Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson in the first degree, and upon conviction thereof, be sentenced to imprisonment for not less than two nor more than twenty years. (am L 1957, ch 141, Sec. 1, p 272 app Apr. 1, 1957.)
>
> Sec. 65-5-2. ..... *Second degree: Burning of buildings or structures other than dwellings.* Any person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in the preceding section, shall be guilty of arson in the second degree, and upon conviction thereof, be sentenced to imprisonment for nor less than one nor more than ten years or by fine of not more than five thousand dollars or by both such fine and imprisonment. (am L 1957, ch 141, Sec. 2, p 272, app Apr. 1, 1957.)

Sec. 65-5-3. *Arson: Third degree: Burning of other property.* Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any personal property of whatsoever class or character; (such property being of the value of one hundred dollars and the property of another person), shall be guilty of arson in the third degree and upon conviction thereof, be sentenced to imprisonment for not less than one nor more than three years or by fine of not more than three thousand dollars or by both such fine and imprisonment. (am L 1957, ch 141, Sec. 3, p 272, app Apr. 1, 1957.)

Sec. 65-5-5. *Arson: Fourth degree: Attempt to burn building or property.* (a) Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections (Sections 65-5-1-65-5-4 herein), or who commits any act preliminary thereto, or in furtherance thereof shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to imprisonment for not less than one nor more than two years or fined not to exceed one thousand dollars or by both such fine and imprisonment.

(b) The placing or distributing of any flammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections (Sections 65-5-1-65-5-4 herein) in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same shall, for the purposes of this Act (Sections 65-5-1-65-5-6

herein) constitute an attempt to burn such building or property. (am L 1957, ch 141, Sec. 4, p 273, app Apr. 1, 1957.)

Sec. 65-5-6. *Burning to defraud insurer.* Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property, of whatsoever class or character whether the property of himself or of another, which shall at the time be insured by any person, company or corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to imprisonment for not less than one nor more than five years or by fine of not more than three thousand dollars or by both such fine and imprisonment. (am L 1957, ch 141, Sec. 5, p 273, app Apr. 1, 1957.)

Also, herewith submitted are the laws before the 1957 amendments. Important changes are italicized by the writer.

Sec. 65-5-1. *Arson: Burning dwelling house of another.* That if any person shall willfully and maliciously bŭrn *any dwelling house* of another, or shall wilfully or maliciously set fire to any building owned by himself or another, by the burning whereof any dwelling house of another shall be burned such person shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than ten nor more than twenty years. (CLA 1913, Sec. 1911; CLA 1933, Sec. 4789.)

Sec. 65-5-2. ..... *Burning other buildings or boat.* That if any person shall willfully and maliciously burn any church, courthouse, townhouse, meetinghouse, asylum, college, academy, schoolhouse, prison, jail, or other public building erected or used for public uses, or any steamboat, ship, or other vessel, or any banking house, warehouse, express office, storehouse, manufactory, mill, barn, stable, shop, or office of another, or shall willfully and maliciously set fire to any building or boat owned by himself or another, by the burning whereof any edifice, building, boat, or vessel mentioned in this section shall be burned such person shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than five nor more than fifteen years. (CLA 1913, Sec. 1912; CLA 1933, Sec. 4790.)

Sec. 65-5-3. *Burning buildings other than those in Sections 65-5-1, 65-5-2, or bridges, etc.* That if any person shall willfully and maliciously burn any building whatsoever of another other than those specified in sections 65-5-1 and 65-5-2, or shall willfully and maliciously burn any bridge, lock, dam, or flume of another, or erected or used for public uses, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years. (CLA 1913, Sec. 1913; CLA 1933, Sec. 4791.)

Sec. 65-5-7. *"Dwelling house" defined.* That any building is deemed a "dwelling house" within the meaning of the sections of this act defining the crime of arson *any part of which has usually been occupied by any person lodging therein.* (CLA 1913, Sec. 2088; CLA 1933, Sec. 5066.)

It is worthy of note that the previous statute did not break the crime into one of separate degrees specifically. It is also worthy of note that the definition of "dwelling house" did not include the word vacant which is present in the 1957 law under Arson in the First Degree, instead it used the definition of "dwelling house" as a house "any part of which has usually been occupied by any person lodging therein."

I.

IT WAS PROPER FOR THE JURY TO BRING IN A CONVICTION OF ARSON IN THE SECOND DEGREE ALTHOUGH THE CHARGE WAS ARSON IN THE FIRST DEGREE AS THE ALASKAN STATUTES CONCERNED PROVIDE THAT A JURY MAY CONVICT A DEFENDANT OF A LESSER DEGREE OF THE CRIME CHARGED IN THE INDICTMENT IN ALL CASES WHERE A CRIME CONSISTS OF TWO OR MORE DEGREES, PROVIDING THE EVIDENCE WARRANTS SUCH A FINDING.

Appellant suggests that the only theory justifying a conviction of Arson in the Second Degree when the actual charge in the indictment is one of Arson in the First Degree is the provision in the rules of criminal procedure which provides that a defendant may be found guilty of any offense necessarily included in the indictment. (See Federal Rules of Criminal Procedure, Rule 31 c and the Alaskan counterpart Section 66-13-74 ACLA 1949.) Actually there are three rules of procedure that justify such a conviction where the crime is one which consists of degrees of a common offense. Sections 66-13-73 through 75 ACLA 1949. These sections, quoted below, are very specific in this regard.

Sec. 66-13-73. *Conviction of degree inferior to charge or of attempt.* That upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof. (CLA 1913, Sec. 2268; CLA 1933, Sec. 5362.)

Sec. 66-13-74. *Conviction of included crime or attempt.* That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime. (CLA 1913, Sec. 2269; CLA 1933, Sec. 5363.)

Sec. 66-13-75. *Effect of doubt as to degree of crime.* That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. (CLA 1913, Sec. 2252; CLA 1933, Sec. 5342.)

The latter section, 66-13-75 would seem to make it mandatory that the judge include a verdict for Arson in the Second Degree as the defense did attempt to contradict the evidence as to the character of the structure burned, thus creating a situation "that there is reasonable ground of doubt in which of two or more degrees he is guilty." The test set up by the code is whether or not the evidence and the nature of the offense justify a conviction of a lesser degree of the offense charged. Under the Alaskan statute the jury

could have found the defendant guilty of a lesser degree of the offense as well as guilty of an offense necessarily included as will be discussed below.

Some jurisdictions apparently allow a conviction of a lesser offense even when the elements are slightly different. A frequent example of this is the felony murder rule. Under the felony murder rule a homicide is made Murder in the First Degree if committed while in the course of the commission of a felony. Even though the indictment may clearly charge the homicide as part of another felony a verdict of Second Degree Murder (any purposeful murder) is generally allowed. (See *Deaton v. District of Columbia Board of Parole,* 180 F. 2d 396.) This is only true where the evidence warrants such a verdict. This ruling has frequently been made as an interpretation of Rule 31 (c), but it seems likely that under the Alaska Statutes relating to crimes consisting of degrees, the ruling would be even more applicable. *Stephenson v. United States* (162 U.S. 313, 16 S. Ct. 839) is frequently cited by the lower courts as authority for that proposition. The test laid down there is based on the evidence presented.

> "... the defendant charged in the indictment with the crime of murder may be found guilty of a lower grade of crime, viz. manslaughter. *There must, of course, be some evidence which tends to bear on that issue.* The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect."

This opinion is reiterated in *Wallace v. United States* (162 U.S. 475, 16 S. Ct. 839), which also stated:

> Necessarily it must frequently happen that the particular circumstances qualify the character of the offense, and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to appear in the evidence. (p. 475.)

The question as to whether or not a separate crime may be necessarily included relates to the question of whether the proof for the greater crime could be used for the lesser and this should be apparently true in the case of a lesser degree of the same crime as well as necessarily included separate crimes which will be discussed below.

II.

NOT ONLY CAN THE CONVICTION BE JUSTIFIED BECAUSE IT IS A LESSER DEGREE OF THE SAME CRIME CHARGED IN THE INDICTMENT, BUT IT CAN ALSO BE JUSTIFIED AS IT IS A LESSER OFFENSE NECESSARILY INCLUDED IN THE OFFENSE CHARGED IN THE INDICTMENT.

In addition to the statutes allowing a conviction of an inferior degree to that charged in the indictment Rule 31 (c) Federal Rules of Criminal Procedure, cited above, allows a conviction of lesser offense necessarily included in the indictment. The Alaskan counterpart of Rule 31 (c) is Section 66-13-74 ACLA 1949, which although worded slightly different is not substantially different. (See *Barbeau v. United States* below.) Rule 31 (c) provides:

> (c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Two Alaskan cases decided by the 9th Circuit distinguish which type of crimes can be considered lesser offenses necessarily included in the offense charged. The present case can be distinguished from the first of these cited below and is quite similar with the latter cited decision.

The first Alaskan case concerned with the definition of lesser necessarily included offenses is *James v. United States,* 238 F. 2d 681, 9 Cir. 1956, dealing with a conviction on a charge of burglary in a dwelling house. In that case a conviction of burglary in a dwelling was set aside as the proof did not show that the building was usually occupied. The government attempted to justify the conviction as one for burglary not in a dwelling house, a crime covered by a separate section of the code but not denominated as a lesser degree of the same crime by the code. The court rejected this contention for several reasons: (1) the minimum punishment for burglary in a dwelling house actually was less than that for burglary not in a dwelling house and therefore it would be difficult to consider it a lesser offense; (2) burglary not in a dwelling house included an element not included in burglary in a dwelling, namely an allegation that the structure was a place where property is kept; (3) that the crime

did not pass the test set out in *Giles v. United States* (9 Cir. 144 F. 2d 860), namely that it is impossible to commit the greater without committing the lesser offenses.

The instant case passes the above test for the following reasons: (1) the minimum punishment for arson in the second degree is less than that for arson in the first degree (i.e. 2 years for arson in the first degree, one for arson in the second degree); (2) arson in the second degree does not have an additional element to prove but requires less proof as it is merely necessary to prove the burning of "any building of whatsoever class or character", thus a charge of arson in the first degree would include arson in the second degree as it is of course necessary to prove the burning of a building in either case; (3) the statutes (65-5-1 and 2 ACLA Cumulative Supplement) specifically refer to arson in the second degree as a "degree" of the crime of arson. This is not the case in the two burglary statutes; (4) the evidence introduced in this case by both sides actually raised the question of whether or not the building was a dwelling and the government did introduce some proof that it was and the defense took issue with the proof introduced. (See Appellee's statement of facts); (5) The definition of "dwelling house" in the arson case is much broader than in the burglary case as it includes the word "vacant" as well as "occupied" and "unoccupied" thus making it more likely that the proof for one crime could include the proof for the lesser degree; (6) It is necessary to commit the

lesser crime in order to commit the greater (i.e. necessary to set fire to a building in order to burn a dwelling house).

The second case referred to is *United States v. Barbeau* (92 F. Supp. 196 D.C. Alaska 3rd) and *Barbeau v. United States* (193 F. 2d 945 same case 9 Cir. *cert. den.* 343 U.S. 968). In that case the Circuit Court decided that a person indicted for first degree murder could be convicted of negligent homicide even though first degree murder required a deliberate killing and the lesser charge required a negligent or not purposeful killing.

One of the issues involved in this decision was whether or not the indictment put the defendant on notice that he could be convicted of the lesser offense. The court held that he was on notice.

> Since the primary requisite of specificity in the charge—informing the accused—has been met, it is proper to say that negligent homicide is raised in a charge of murder. (p. 948.)

In the *Barbeau* case as well as in the instant case one of the defenses raised was the inferior crime. In *Barbeau* it was claimed that the shooting was negligent because of a defective safety on the gun. In both cases the defense took issue with an allegation of the indictment and was therefore clearly on notice as to the included lesser offense.

Another similar case is *Owens v. United States,* 58 Federal 2d, p. 684 where a conviction of second degree murder was sustained although the charge was mur-

der while committing robbery. (Citing *Wallace v. United States,* 162 U.S. 466 and *Horning v. D.C.,* 254 U.S. 135.) Here the court was impressed because the evidence which was admitted under the charge in the indictment was sufficient proof of the lesser crime.

> The fact that the evidence indicated that appellant was guilty as charged in the second count did not deprive the jury of the power to return a verdict of the lesser offense of murder in the second degree.

Another similar case is *United States v. Lovely,* 77 F. Supp. 619, where it was held that since the crime of rape included an intent to have intercourse by use of force it necessarily included the crime of assault with intent to commit rape and the lesser offense was thus at issue up until the time the element of penetration, which distinguished the two crimes, was admitted. In the instant case the character of the building was the only point at issue distinguishing the two crimes and it remained at issue throughout the trial.

Another case where a verdict of simple assault was allowed when the defendant had been charged with the felony of force likely to produce great bodily injury is *People v. Spreckels,* 270 Pacific 2d 513, App. Calif. 4, where the court said at page 517:

> Under the circumstances presented by the record before us it is apparent that the defendant was not required to guess as to the meaning of the charge and was afforded notice and full opportunity to be heard. It does not appear that he was unable to plan his defense with certainty.

This decision was based on Section 1159 of the Penal Code of California permitting a jury to bring in a finding of guilty on a necessarily included offense.

Another Alaskan Statute also relevant is Section 66-12-9 ACLA 1949 "Conviction or acquittal of a crime consisting of different degrees."

> Sec. 66-12-9. *Conviction or acquittal of crime consisting of different degrees.* That when the defendant shall have been convicted or acquitted upon the indictment for a crime consisting of different degrees, such conviction or acquittal is a bar to another indictment for the crime charged in the former, or for any inferior degree of that crime, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment, as provided in sections 66-13-56 and 66-13-57. (CLA 1913, Sec. 2216; CLA 1933, Sec. 5286.)

This section is an amplification of the "double jeopardy" clause of the constitution. It includes by its terms lesser degrees of the same crime and necessarily included offenses to the crime set forth in the indictment and substantiates the theory set forth herein that conviction of arson in the second degree is justified either as a lesser degree of the crime charged or as a necessarily included offense in the charge set forth.

In view of the above it is submitted that Arson in Second Degree is a necessarily included offense to Arson in the First Degree and that the case falls

within the rule of *James v. United States* and *Barbeau v. United States* cited above.

The *James* case should also be interpreted in view of the *Stephenson* case cited above. The 9th Circuit says it must be impossible to commit the greater crime without committing the lesser, and the Supreme Court was probably saying the same thing when it said the proof of the greater crime must be of such a nature as to show that the lesser crime was committed. It seems clear that if the proof that building was a dwelling house fell short the jury could still find that place burned was a building or other structure because proof of its nature as a dwelling must necessarily refer to its nature as a structure of some sort. For example if, as was claimed, its use as a dwelling had been abandoned, it would still be a building of the sort described in the second degree arson statute.

CONCLUSION.

I. The verdict of the jury finding the defendant guilty of the crime of arson in the second degree is justified by the terms of Section 66-13-73 ACLA 1949 providing that a defendant may be found guilty of lesser degree of the crime charged in the indictment.

II. The conviction of the defendant can also be justified under the theory that the crime for which he was committed is necessarily included in the crime charged in the indictment as the issue was raised by the indictment as to the character of the building burned.

The errors complained of by appellant therefore do not exist and the decision of the court below by sound interpretation of law and by proper consideration of the facts of the case while applying the law. The judgment should be affirmed.

Respectfully submitted,

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